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No. 99-1257

IN THE
Supreme Court of The United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF AMICUS CURIAE OF LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AMERICAN SOVEREIGNTY ACTION PROJECT, GUN OWNERS FOUNDATION, PUBLIC ADVOCATE OF THE U. S., AMERICAN POLICY CENTER, 60 PLUS, TRUE BLUE FREEDOM, AND U.S. BORDER CONTROL IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici curiae*,[1] Lincoln Institute for Research and Education, American Sovereignty Action Project (a project of Citizens United Foundation), Gun Owners Foundation, Public

[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Advocate of the United States, American Policy Center, 60 PLUS, True Blue Freedom, and U.S. Border Control, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States. All of the *amici* were established within the past 25 years for public education purposes related to participation in the public policy process, and are tax-exempt under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to the correct interpretation of the United States Constitution and the laws of the United States. None of these *amici* have participated thus far in any aspect of this case before this Court or in the lower courts. In the past, most of the *amici* have conducted research on other issues involving constitutional interpretation, and have filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues. [2]

SUMMARY OF ARGUMENT

Section 109 of the Clean Air Act ("CAA") effects an unconstitutional delegation of congressional power because it is not intelligibly related to any constitutional grant of power to Congress. The CAA originally rested upon the legislative power of Congress to "provide for the general welfare." The

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[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

current CAA rests upon a presumptive federal police power to promote the general welfare. As an exercise of a plenary power to promote the general welfare, section 109 of the CAA is not intelligibly related to any constitutional power of Congress in relation to the general welfare. As a delegation of power to regulate interstate commerce, or to regulate conditions substantially related to interstate commerce, section 109 is not intelligibly related either to the Commerce Clause or the Necessary and Proper Clause.

Section 109 of the CAA also effects an unconstitutional delegation of power because it does not provide a general rule to which the EPA must conform in setting National Ambient Air Quality Standards (NAAQS). Under the intelligible principle test, Congress must provide a rule of conduct to guide the exercise of administrative discretion. Section 109 does not provide such a general rule. Section 109 also fails to provide any meaningful standard governing the exercise of discretion. Thus, it violates the constitutional prescription that Congress is the authorized law maker, subject only to the veto of the president. The constitutional separation of powers doctrine obliges this Court to strike down the delegation of power in section 109 of the CAA.

ARGUMENT

INTRODUCTION

"On April 22, 1970, America celebrated the first Earth Day," setting off an "'environmental revolution" punctuated in the next four years by congressional enactment of "major legislation on virtually every facet of the environment: air pollution, water pollution, wild life protection, pesticides, and coastal zone management." At the head of the parade were the

Clean Air Amendments of 1970, enacted into law on December 31, 1970 on the heels of the newly-established Environmental Protection Agency (EPA), created just 29 days before. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L. J. 395, 395-96 (1995).

These new amendments to the Clean Air Act featured a brand new grant of power: "to establish nationwide ambient air standards." 1970 U.S. CODE CONG. & ADMIN. NEWS 5356-57, 5362. House Report No. 91-1146 explained the significance of this empowerment, contrasting the old law, under which the states set "ambient air quality standards," with the new, wherein the Administrator of the EPA would "establish nationwide standards based on criteria developed by him for various pollutants...." Id. at 5357, 5362, 5374.

To facilitate this fresh delegation of power, Congress, affirming the Administrator's existing authority to identify air pollutants "which in his judgment [have] an adverse effect on public health or welfare" (*see* Pub. L. 90-148, 81 Stat. 491 (1967)), granted the additional authority to set "national primary ambient air quality standards ... which **in the judgment** of the Administrator ... allowing an adequate margin of safety, are requisite to protect the public health." Section 109 of Pub. L. 91-604, 84 Stat. 1680 (1970) (emphasis added). Thus, the stage was set 30 years ago for the constitutional challenge now before this Court.

It is well-established by the opinions of this Court that Article I, Section 1 of the United States Constitution, which vests "all legislative powers herein granted in a Congress of the United States," acts "both as a grant of powers to Congress and as a prohibition on congressional delegation of legislative power to any other institution." 1 K. DAVIS and R. PIERCE, ADMINISTRATIVE LAW TREATISE 66 (3d ed. 1994) (hereinafter

Davis Treatise). Since Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) was decided 72 years ago, this Court has applied a singular constitutional test by which congressional delegations of power are to be measured: "[i]f Congress shall lay down by legislative act an **intelligible principle** to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (Emphasis added.) *See* Mistretta v. United States, 488 U.S. 361, 371-72 (1989).

Although this Court has not struck down a congressional delegation since the early New Deal (id., 488 U.S. at 373), the "intelligible principle" standard is not the child of an out-of-date court, as so many critics of the "nondelegation doctrine" insist. *See, e.g.,* 1 Davis Treatise, *supra,* at 66-74. First, the two New Deal opinions, striking down delegations under Franklin Delano Roosevelt's National Industrial Recovery Act, were not written by one of the court's four "curmudgeons" — Justices Van Devanter, McReynolds, Sutherland or Butler — but by the forward-looking chief justice, Charles Evans Hughes. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Indeed, in the much maligned, but never overruled, Schechter case, the thoroughly modern justice, Benjamin Cardozo, lent the prestige of his pen to affirm the nondelegation doctrine and the majority's holding. Id., 295 U.S. at 551-54. (Cardozo, J. concurring.)

Second, even though this Court has not struck down any congressional delegation since Schechter, the nondelegation doctrine and its "intelligible principle" test have guided this Court to adopt more restrictive interpretations of congressional delegations of power. *See, e.g.*, National Cable Television Ass'n., Inc., v. United States, 415 U.S. 336, 342 (1970); Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607,

646 (1980). To reach these interpretative solutions, this Court has examined both the statutory text and its legislative history, guided by the "intelligible principle" test. That test, in turn, requires the Court first, to identify the enumerated legislative power exercised by Congress. After all, the nondelegation doctrine is rooted in the same constitutional provision that limits Congress to the exercise of only the legislative powers "herein granted." As Justice Cardozo pointed out in his concurring opinion in Schechter, a delegation, in order to contain a principle that is **intelligible**, must reasonably relate to a specified congressional power. Thus, Justice Cardozo did not measure the delegation of power in Schechter to approve "codes of fair competition" developed by trade associations in relation to "whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected," but in relation to Congress's power under the "commerce clause," concluding that a delegation that runs "as wide as the field of industrial regulation ... is delegation running riot. No such plenitude of power is susceptible of transfer." Schechter, *supra,* 295 U.S. at 552-53.

The second prong of the "intelligible principle" test is whether Congress has laid down a "standard" governing the "means" by which its expressed policies are to be enforced. As Justice Cardozo put it in Schechter, there is no constitutional infirmity in giving to the executive branch the power to choose "the occasion" to act, but Congress must either lay down a statutory rule governing the means of enforcement, or use language that points to a preexisting rule "according to accepted business standards or accepted norms of ethics." Id., 295 U.S. 551-53.

Section 109 of the Clean Air Act fails both halves of the intelligible principle test, for it is neither an "intelligible"

exercise of an enumerated power, nor does it contain a meaningful "principle" to govern EPA discretion.

I. SECTION 109 OF THE CLEAN AIR ACT IS NOT INTELLIGIBLY RELATED TO ANY CONSTITUTIONALLY ENUMERATED POWER OF CONGRESS.

A. The Original CAA Invoked Congress' Constitutional Power to "Provide for the General Welfare."

The CAA originated in "the Air Pollution Control Act of 1955, that defined the federal role as being confined largely to research [declaring] that air pollution control responsibilities rested primarily with the states...." W. RODGERS, ENVIRONMENTAL LAW 130 (2d ed. 1994). Indeed, Congress expressly stated that it was "the policy of Congress to **preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution**." Public Law 159, 69 Stat. 322 (1955) (emphasis added). Thus, "Congress initially responded to the problem of air pollution by offering encouragement and assistance to the States." Train v. Natural Resources Defense Council ("NRDC"), 421 U.S. 60, 63 (1975).

When it amended the 1955 law by enacting the CAA of 1963, Congress remained steadfast, finding "that the prevention and control of air pollution at its source is the primary responsibility of States and local government," and limiting the federal role to that of "provider,"subsidizing and facilitating state and local government action. Section 1(a)(3) and (4) of Pub. L. 88-206, 77 Stat. 392, 393 (1963). Despite finding that the air pollution problem cut across state lines and was brought about "by urbanization, development and the increasing use of

motor vehicles," Congress chose to limit federal involvement to research and development, technical and financial assistance to state and local government air pollution programs, and encouragement and assistance to regional air pollution programs, all to the ultimate end "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 1(b) of Pub. L. 88-206, 77 Stat. 392, 393 (1963).

Even though the 1963 Act provided for federal assistance in "actions directed toward abatement of particular air pollution problems," House Report No. 508 insisted that the Clean Air Act continued to recognize the "primary **responsibilities and rights** of the States and local governments in controlling air pollution" because "[i]t is well established that the protection of the health and welfare of the citizens of a State is a proper subject for the exercise of the **State police power**." 1963 U.S. CODE CONG. & ADMIN. NEWS 1263, 1267 (emphasis added).

By recognizing the primary role of state and local government in the control of air pollution, and limiting the federal role to that of "provider," congressional efforts to control air pollution from 1955 through 1963 followed the well-established pattern of "dual federalism," the constitutionality of which has been unquestioned since Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

B. The Current CAA Rests Upon a Presumed Power of Congress to Promote the General Welfare.

In 1965, Congress breached this wall of "dual federalism," invading the regulatory territory of state and local governments with a grant of power to the Secretary of Health, Education and Welfare ("HEW") to regulate "the emission of any kind of substance, from any class or classes of new motor vehicles or

new motor vehicle engines, which **in his judgment** cause or contribute to, or likely to cause or contribute to air pollution which endangers the health or welfare of any persons...." Section 202(a) of Pub. L. 89-271 992 (1965) (emphasis added). House Report No. 899 defended this expanded federal role as necessitated by "trends of economic growth, technological progress, and rising urban populations," such that "air pollution, especially emanating from motor vehicles, affecting thousands of communities in all parts of the country are imposing a serious threat to public health and national welfare." 1965 U.S. CODE CONG. & ADMIN. NEWS 3610. The Report suggested, however, that the problem of motor vehicle emissions was an exception, not to be taken as a departure from Congress' view that control of air pollution remained as a "basic right ... and responsibilit[y] ... of States." Id. at 3612.

Two years later, Congress enacted the Air Quality Act of 1967. Although Congress reiterated verbatim the fourfold findings and purposes in the Clean Air Act of 1963, it extended the coercive power of the federal government, authorizing the HEW Secretary to set the criteria by which standards for ambient air quality were to be measured, and thereby fixing a national floor below which state and local governments could not go. If those governments failed to meet the federal minimum, Congress authorized HEW to take direct action to effect federal abatement based upon HEW's criteria, not just withhold federal funds. 1967 U.S. CODE CONG. & ADMIN. NEWS 1952-54.

Before the states could complete their "standard-setting and plan-preparation" duties under the 1967 Act, they were overtaken by the Clean Air Act Amendments of 1970, which, in the words of this Court, took "a stick to the States ... no longer giv[ing] [them] any choice as to whether they would meet [the] responsibility [to combat air pollution]." Train v.

NRDC, 421 U.S. at 64-65. This shift in power did not come as a result of new congressional findings that state and local air pollution control was inadequate, nor did it come from a deliberate expansion of the federal purposes in effecting air quality, as the findings and purposes of the CCA of 1963 remain unaltered even to this day. 42 U.S.C. § 7401. Instead, the change came from what House Report No. 91-1146 identified to be an irresistible "ground swell" of public opinion:

> Citizens and officials on the grassroots level throughout the United States have become seriously aroused over the threat of air pollution to health and well-being and they are anxious to have stringent controls imposed and enforced effectively at the earliest possible date.... This ground swell is important if we are to secure clean air everywhere in the United States, and it is important that this momentum not be lost. Therefore, it is urgent that Congress adopt new clean air legislation.... [1970 U.S. CODE CONG. & ADMIN. NEWS 5360.]

Although Congress expressed itself in generalities, it is not too difficult to chronicle the events to which this Report referred:

> On April 22, 1970 ... the first Earth Day [, o]ne hundred thousand people walked down New York's Fifth Avenue to demonstrate their concern for the planet. At 1500 college campuses and 10,000 schools, many thousands more participated in teach-ins and other ecological happenings. Politicians rode bicycles. Demonstrators protested ... air pollution by smashing automobiles with sledgehammers. From Clarksburg, West Virginia ... to San Francisco, California..., the nation displayed its dismay at the state of the environment. [Anderson, *The*

> *Environmental Revolution at Twenty-Five*, 26 RUTGERS L. J., at 395.]

In its haste not to be left behind by this "environmental revolution," Congress did not bother to spell out why it had finally discarded the "dual federalism" approach to air pollution control, and to assign to the EPA primary responsibility for regulating ambient air quality. Normally, when Congress decides to impose a national regulatory standard, when its purpose is to protect the health, safety or welfare of the people, Congress relies upon its powers to enact laws that are necessary and proper to regulate interstate commerce as justification for its intrusion upon state "police power." *See, e.g.,* United States v. Morrison, 529 U.S. ___, 120 S.Ct. 1740, 146 L.Ed. 2d 658, 674, 683-88 (2000). But Congress did not do that here. Rather, from the beginning, Congress has indicated that, when it comes to air pollution, its overriding objective has always been "to promote the public health and welfare."

In 1955, it placed responsibility for the federal effort to combat air pollution in the Department of HEW, with the nation's Surgeon General playing a prominent role. Train v. NRDC, *supra,* 421 U.S. at 63. This continued until 1970 when the EPA was established. The change from HEW and the Surgeon General to the EPA and its Administrator did not signal a change in constitutional purpose or policy. As previous Congresses were concerned with the public health in the first 15 years of combating air pollution, so, according to Conference Report No. 91-1783, was the 91st Congress concerned when it enacted the Clean Air Act Amendments of 1970: "The [national ambient air quality] standards were to be adequate to protect the health of persons. The goals were to be adequate to protect the public health or welfare from any adverse effects." 1970 U.S. CODE CONG. & ADMIN NEWS 5376.

Yet, as Congress previously acknowledged, a regulation that "protect[s] ... the health and welfare of the citizens of a State is proper ... exercise **of the State police power**." 1963 U.S. CODE CONG. & ADMIN. NEWS 1267 (emphasis added). So long as Congress linked federal involvement to funding, and other "providing" functions, Congress operated within its power to "provide for the general welfare." *See* United States v. Butler, 297 U.S. 1, 64 (1936). Once it moved beyond setting national standards in conjunction with its "spending power," however, Congress began to impose direct regulations for the purpose of promoting the general welfare, presuming that it had, like the states, a general police power.

C. Section 109 of the CAA Is Not Intelligibly Related to Any Constitutional Power of Congress Concerning the General Welfare.

Since United States v. Butler, *supra*, it has been settled that the General Welfare Clause "confers [upon Congress] only a power to spend [not an] independent power to regulate." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 322 (2d ed. 1988). As Justice Joseph Story observed, if Article I, Section 8, Clause 1 confers upon Congress the power to "provide for the common defense and general welfare," independent from the power "to lay and collect taxes," then "the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION, § 907 (5th ed. 1891).

Although Congress' "general welfare" power must be tied to its power to appropriate money from the federal treasury, it may use its "spending power" to accomplish purposes outside those enumerated in the constitutional text. United States v. Butler, 297 U.S. at 65-67. Congress may accomplish such

purposes, however, only by conditioning the receipt of federal subsidies upon compliance with national standards. Thus, it may, pursuant to its "general welfare" power, impose national standards upon the states only if the states choose to take the federal funds. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

According to the legislative history and the statutory text, Congress has occupied the field of ambient air quality **solely** in pursuit of the "public health and welfare." Thus, section 108 of the CAA instructs the EPA Administrator to continue to develop "air quality criteria" for "each pollutant ... emissions of which, **in his judgment**, cause or contribute to air pollution which may reasonably be anticipated to endanger **public health or welfare**." Section 109, in turn, instructs the Administrator to take "such criteria and allowing an adequate margin of safety," prescribe "primary ambient air quality standards" that are "requisite to protect the **public health**" and "secondary ambient air quality standards" that are "requisite to protect the **public welfare** from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. §§ 7408(a), 7409(b).

According to the EPA, and lower court opinions construing this language in light of the legislative history, the EPA Administrator must not consider "economic costs," or engage in any other kind of "cost/benefit" analysis, in the setting of the NAAQS. Indeed, the EPA has scrupulously abstained from taking such costs into consideration, limiting its focus solely to the factors of "public health" or "public welfare." *See Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Env't. and Pub. Works Comm.*, 105th Cong., 1st Sess. 282 (1997). And the United States Court of Appeals for the District of Columbia Circuit has read Section 109(b)(1) of the CAA as

barring the EPA from considering even technological feasibility, ruling that the sole objective of the CAA is to protect public health. Lead Industries Ass'n. v. EPA, 647 F.2d 1130, 1149-56 (D.C. Cir. 1980). *Accord*, Train v. NRDC, 421 U.S. at 78 ("[P]rimary ambient air standards deal with the quality of outdoor air and are fixed on a nationwide basis at levels which the Agency determines will protect the public health.")

Had Congress continued to pursue this singular goal of public health in the setting of NAAQS by means of its spending power, then providing a one-dimensional guide to the EPA could have been intelligibly related to its constitutional power to "provide for the general welfare." But it did not give the states a choice to comply with the NAAQS at the risk of losing federal air pollution control subsidies. Rather, as this Court ruled in Train v. NRDC, "they [the States] were required to attain air quality of specified standards, and to do so within a specified period of time." 421 U.S. at 65. Thus, the standard in Section 109 of the CAA governing the power of the EPA to set NAAQS cannot possibly be justified as intelligibly related to the "public health and welfare," because Congress has no general police power under the Constitution to promote the public health and welfare . To paraphrase Justice Cardozo's concurring opinion in Schechter, *supra*, 295 U.S. at 552-53, "[n]o such plenitude of power is susceptible of transfer," because Congress does not have plenary power to promote the general "well-being" of the people.

D. Section 109 of the CAA Is Not Intelligibly Related to Either the Commerce Clause or the Necessary and Proper Clause.

As noted above, it is a vain search, indeed, to seek in the legislative history leading up to the Clean Air Amendments of

1970 any congressional expressions of concern that air pollution was having an adverse impact on the national economy. The House Report supporting the imposition of national standards on motor vehicle emissions focused solely upon the "health problems arising out of automotive air pollution," concluding that "exhaust control standards on a national scale are necessary and would be of benefit to the entire country." 1965 U.S. CODE CONG. & ADMIN. NEWS 3611-12. Similarly, in 1967, Congress authorized the HEW Secretary "to proceed immediately to court for abatement of any pollution that creates substantial and imminent public health endangerment ... regardless of technological and economic feasibility." 1967 U.S. CODE CONG. & ADMIN. NEWS 1954-55. Not surprisingly, then, when Congress enacted the 1970 amendments, authorizing the EPA Administrator to fix NAAQS, it did so out of regard for "the health and well-being of the American people," not the health and well being of the national economy. Congress did not even dictate to the EPA that it must take into account both "technological feasibility" and "economic costs" in the setting of NAAQS, whatever the source, although it had previously instructed the EPA to consider both factors in setting the standards for emissions from a single source, the motor vehicle. *Contrast* House Report No. 899 in 1965 U.S. CODE CONG. & ADMIN. NEWS 3616 *with* House Report No. 91-1146 in 1970 U.S. CODE CONG. & ADMIN. NEWS 5356-57, 5362.

In the past, when Congress has invoked its powers under the Commerce Clause, and its familiar companion, the Necessary and Proper Clause, it has limited the scope of its regulation accordingly. For example, when Congress legislated against the "moral wrong" of racial discrimination in the 1964 Civil Rights Act, the ensuing prohibitions against that moral wrong were tailored to its adverse impact on interstate commerce. It did not legislate against racial discrimination

generally, even though one of the stated purposes of the 1964 Act was "to promote the general welfare by eliminating discrimination based on race...." *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Congress chose not to follow this pattern, however, with the Clean Air Act. Having stated as one of its purposes "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," Congress not only gave the EPA, by the terms of Section 109, *carte blanche* to set nationwide ambient air standards without regard for any factor related to the national economy, but also, by the terms of Section 110, did not condition the timetable for implementation and enforcement of those ambient air standards upon findings related to the economy. 1970 U.S. CODE CONG. & ADMIN. NEWS 5363-65. Even though the original timetable of Section 110 has been changed, the implementation section of the statute has never been construed as a grant of "exceptions" to the standards, such exceptions being confined to those permitted under Section 110(f), after a finding, among other things, that "the continued operation of [the polluting] source is essential to national security or to the public health or welfare." *See generally* Train v. NRDC, 421 U.S. at 78-99.

By making "requisite to protect the public health" the single factor by which the EPA Administrator determines national primary ambient air quality standards, and by making "requisite to the public welfare" the single factor by which the EPA Administrator sets such secondary standards, Congress divorced the Clean Air Act and its 1970 Amendments from the Commerce Clause and the Necessary and Proper Clause. Thus, neither factor meets the "intelligible" prong of the "intelligible principle" test that this Court has applied in the enforcement of its nondelegation doctrine. Again, paraphrasing Justice

Cardozo's opinion in Schechter, Congress has authorized the EPA to set such NAAQS as it thinks "desirable or helpful for the well-being or prosperity" of the nation: "[t]his is delegation running riot. No such plentitude of power is susceptible of transfer." Schechter v. United States, 295 U.S. at 553.

II. SECTION 109 OF THE CLEAN AIR ACT DOES NOT PROVIDE A GENERAL RULE TO WHICH THE EPA ADMINISTRATOR MUST CONFORM.

A. Congress Must Provide a Rule of Conduct to Guide the Exercise of Administrative Discretion.

In the seminal case of Hampton & Co. v. United States, 276 U.S. 394 (1928), this Court stated that the "intelligible principle" test could be satisfied only if Congress declared the "general rule ... to which the person or body authorized" to act "is directed to conform." Id., 276 U.S. at 408, 409. In so ruling, the Court simply adopted a phrase, the meaning of which had been previously settled in its opinions dating back to its early history.

In 1815, Chief Justice John Marshall illustrated the meaning of "intelligible principle" by equating it to a statement of a general rule of law, as contrasted to one of the rule's many applications:

> The **rule** that the goods of an enemy found in the vessel of a friend are a prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored ... is founded on the simple and **intelligible principle** that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the

propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. [The Nereide, 13 U.S. (9 Cranch) 388, 418-19 (1815) (emphasis added).]

Twelve years later, Justice Bushrod Washington expressed the same understanding that a statement of an "intelligible principle" was equivalent to a statement of a general rule. Mason v. Haile, 25 U.S. (12 Wheat.) 370, 379 (1827) (Washington, J., dissenting). In 1839, Justice Phillip Barbour in similar manner equated a general rule governing the interpretation of written contracts to a statement of "intelligible principle." Bradley v. The Washington, Alexandria, and Georgetown Steam Packet Co., 38 U.S. (13 Pet.) 89, 97 (1839). Ninety years later, this Court still indicated that to be "intelligible," a law must establish a meaningful "'standard of duty'" or a "'prohibition by which conduct can be governed,'" or otherwise '[i]t is not a rule at all; it is merely exhortation and entreaty.'" A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 240 (1925).

In light of such usage, this Court found that Congress was not required to write a statute with such precision as to direct the President in "the details of its execution," but that it was perfectly "intelligible" for Congress to lay down a general rule of reciprocal equality in the fixing of tariffs, leaving it to the President only "to ascertain and declare the event upon which [Congress'] expressed will was to take effect." Hampton & Co. v. United States, 276 U.S. at 404, 406, 410-11. On the other hand, this Court ruled in both Panama Refining Co. v. Ryan, 293 U.S. at 415, 418, 427, 430, and Schechter v. United States, 295 U.S. at 541, that Congress had failed to meet the "intelligible principle" test because it had failed to lay down a

"general rule" governing the exercise of presidential discretion.

B. Section 109 of the Clean Air Act Does Not Provide a General Rule Controlling EPA Discretion.

Section 109(b)(1), on its face, does not state a general rule guiding the discretion of the EPA Administrator in setting NAAQS. To the contrary, it is left to "the **judgment** of the Administrator" to determine those standards for each air pollutant "which **in his judgment** has an adverse effect on public health or welfare" and for which he has developed air quality criteria, "allowing [for] an adequate margin for safety, [as] are requisite to protect the public health [or] welfare." 42 U.S.C. §§ 7408 and 7409 (emphasis added). As pointed out by the majority opinion below, neither Section 109 nor Section 108 of the CAA provides any "determinate criterion for drawing lines," leaving "it free to pick any point between zero [risk to the public health or welfare] and a hair below the concentrations yielding London's killer fog." American Trucking Ass'ns v. United States (hereinafter A.T.A. v. U.S.), 175 F. 3d 1034, 1037 (D.C. Cir. 1999).

Even the dissent below did not find that either Section 109 or Section 108 set forth a general rule by which to measure the EPA Administrator's discretion. To the contrary, the dissent admitted that the Clean Air Act requires the Administrator to "set pollution standards at levels *necessary* to protect the public health, whether 'reasonable' or not, whether 'appropriate' or not." Id., 175 F.3d at 1058. As Chief Justice John Marshall pointed out in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-21 (1819), the word "necessary" signifies a matter of discretion, not one of obligation, and, if applied to Section 109, it can mean any air quality standard that facilitates, in the unreviewable opinion of the Administrator, the goals of public health or welfare.

Implicitly recognizing this fact, the dissent below made a valiant attempt to maintain that EPA must base its standards on "air quality criteria" that accurately reflect the latest scientific knowledge" and that "the EPA followed the guidelines published by the American Thoracic Society," setting "the ozone and fine particle standards within ranges recommended by the CASAC, the independent scientific advisory committee created pursuant to section 109 of the Act." ATA v. U.S., 175 F.3d at 1058-61. As the majority observed, however, the "question whether EPA acted pursuant to lawfully delegated authority is not a scientific one." Id., 175 F. 3d at 1036. Moreover, the statute creating the scientific advisory committee contains no rule governing that committee's discretion. And even if it did, it would run afoul of the absolute rule that Congress may not delegate such power to "private persons whose interests may be and often are adverse to the interests of others" who are affected by the regulation. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

In a final effort to rescue Section 109, the dissent below suggested that "[b]ecause the Clean Air Act gives politically accountable state governments primary responsibility for determining how to distribute the burdens of pollution reduction, and therefore how NAAQS will affect specific industries and individual businesses, courts have less reason to second-guess the specificity of the congressional delegation." A.T.A. v. U.S., 175 F.3d at 1061. Just the opposite is the case. According to the Necessary and Proper Clause, it is for Congress, **not** the states, to "make all laws which shall be necessary and proper for carrying into Execution" the powers granted in the Constitution. Moreover, as this Court has already established, the power of the states granted under Section 110 of the Clean Air Act has **nothing** to do with the

setting of the national ambient air standards,[3] but only the implementation and enforcement of them. Train v. NRDC, 421 U.S. at 64-65, 79, 89-90.

C. Section 109 Fails to Provide Any Meaningful Standard Limiting EPA Discretion.

It has often been stated by this Court that it is enough if a statute contains a meaningful standard guiding the discretion of the administrative agency, and that such a standard may be gleaned either from words with meanings acquired through long-standing customs analogous to the common law (United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932)) or "from the purpose of the Act, its factual background and the statutory context in which they appear." American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

In his concurring opinion in the Schechter case, Justice Cardozo allowed that Congress may use words with prepackaged meanings because of the historical gloss that has been placed upon those words in accordance with commercial business practices and social customs. It is one thing, Justice Cardozo observed, to use such words as "unfair" which connote wrongdoing "according to accepted business standards or accepted norms of ethics," but it is quite another to use such words as "fair" which connote "whatever ... may be desirable or helpful for ... well-being or prosperity...." With respect to words of the latter type, Justice Cardozo opined, their function "is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses." Hence, he concluded, such "positive" words must be defined with

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[3] State and local governments may set higher **state** and local standards, but not national ones. *See* 42 U.S.C. § 7416.

precision, lest they open the floodgates of regulation without sufficient congressional limitation. Schechter Poultry Corp. v. United States, 295 U.S. at 552-53.

The phrases, "requisite to protect public health" and with an "adequate margin of safety" are unknown to the common law, without reference, for example, to the language of nuisance or trespass. Thus, unlike a term such as "unfair competition," which has a common law reference point, such phrases do not convey a "limited concept." *See* id., 295 U.S. 531-32. Nor are they referents to medical, scientific or other terminology with commonly understood meanings.[4] Moreover, the words used in Section 109 are of the "positive," not "negative," type. As Professor Cass Sunstein has recently observed, both the provision in Section 109 relating to public health and the one relating to the public welfare "appear to contemplate the existence of 'safe thresholds.' The basic idea is that EPA should ensure that the air is 'safe' and the public welfare is 'protected.'" SUNSTEIN, *Is the Clean Air Act Constitutional?*, 98 MICH. L. REV., 303, 314. Thus, the Clean Air Act is designed not just to eliminate "unclean" air, but to

[4] Those who are unfamiliar with the realities of environmental law, when reviewing goals such as "adequate margin of safety" and "requisite to protect public health," cannot appreciate the roaring scientific debate as to what levels of emissions are permissible under such terms. Not only is it difficult to reach agreement on appropriate models to analyze emissions, the level of emission at which any particular pollutant is harmful is not always rationally determinable. Allowing the Administrator then to pick an emission level providing an "adequate margin of safety," particularly with cost not being a consideration, serves further to remove the final emission standard from an objectively supportable standard. For a discussion of just some of the disputes underlying the setting of such standards, *see* Michael Fumento, *Science Under Siege*, chapter 2, "Of Mice (and Rats) and Men: The Politics of Cancer Testing" and chapter 3, "A Fairly Brief Nonboring Lesson in the Pitfalls of Amateur Epidemiology."

achieve "clean" air, not just to eliminate "unhealthy" industrial facilities, but to promote "healthy" facilities. But, as Professor Sunstein has also observed, the statute provides absolutely no guidance to the EPA as to how "safe," or how "clean" and how "healthy" the air must be. Even the chairman of the EPA's Scientific Advisory Committee has "unambiguously confess[ed] ... the impossible nature of the task imposed on EPA by the Act." Id., 98 MICH. L. REV., at 315.

In short, the EPA is a 1970's version of the NIRA, which Justice Cardozo described as having been set up to enact a "comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption." Schechter, 295 U.S. at 553.

This uncertainty of meaning is compounded, rather than resolved, by examining the "purposes" of the Act, its factual findings, and statutory context. The statement of purpose of the Clean Air Act is as broad and extensive, if not more so, than that in the discredited NIRA. Section 109(b)(1) of the CAA reads:

> to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.

The declaration of policy in the NIRA read, in relevant part:

> to provide for the general welfare ... to promote the fullest possible utilization of the present productive capacity of industries... and otherwise to rehabilitate industry and to conserve natural resources. [Schechter, 295 U.S. at 531, n. 9.]

Thus, "requisite to the public health," like the term "fair competition" in the NIRA, is no more than a "convenient designation for whatever set of laws the formulators of a code ... may ... prescribe as being wise and beneficent provisions ... to accomplish the broad purposes of rehabilitation [and] correction...." Id., 295 U.S. at 531.

The findings of the CAA do nothing to narrow that Act's broad purpose. Rather, the finding in Section 1(a)(2) acknowledges that air pollution is a "complex" subject that has a wide-ranging adverse impact upon people, places and things. Yet Congress has made no specific findings that would give policy direction to the Administrator charged with enforcing the Act. This glaring omission has led one astute commentator to observe that "[t]he day will eventually come when the same court of appeals holds that EPA has behaved unlawfully both for regulating above a certain level and also for not regulating below that level." Sunstein, *supra*, 98 MICH. L. REV. at 322.

D. The Constitution Prescribes that Congress is the Authorized Law Maker, Subject only to the Veto of the President.

The decision of the majority below, while giving lip-service to the nondelegation doctrine, has ordered a remedy that would emasculate it. It gives up on the idea that Congress makes the rules in favor of a remedy whereby "[t]he agency will make the fundamental policy choices," after being given "an opportunity to extract a determinate standard on its own." A.T.A. v. United States, 175 F.3d at 1038. In doing so, it has adopted Kenneth Culp Davis' view that the nondelegation doctrine is "dead" and that Congress cannot "be expected to legislate specifically, and should not be asked to do so," so long as "agencies could be required to develop protections against uncontrolled discretionary power, and to adhere to them."

Sunstein, "Is the Clean Air Act Unconstitutional?," 98 MICH. L. REV., at 340. Such a doctrine of "administrative self-restraint" has no place in a Constitution that, after vesting "all legislative powers herein granted" in "a Congress of the United States," Constitution, Art. I, Sec. 1 enumerates as one of those powers, "to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers." Id., Art. I, Sec. 8.

As Justice Hugo Black put it in the "steel seizure" case, it is Congress, not the President (and certainly not any administrative agency composed of persons who are not even constitutional officers), which determines not only the public policies of the nation, but the "manner" by which such policies are to be executed. Thus, it is for Congress to adopt a particular policy, and then to promulgate the "rules of conduct to be followed" in pursuit of such policy. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952). Whatever rules are adopted by an executive or administrative officer, as this Court dictated in both Panama Refining, 293 U.S. at 428-29, and Schechter, 295 U.S. at 529-30, must be "subordinate" to the rules laid down by Congress. If Congress has laid down no general rule, then such rules can hardly be of this subordinate class.

Indeed, if Congress does not make the rules governing interstate commerce, then Congress has failed to exercise the power vested in it by Article I, Section 8, Clause 3. As Chief Justice John Marshall ruled in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824), "the power to regulate ... is **to prescribe the rule** by which commerce is to be governed, [and] this power, like all others vested in Congress, is complete in itself, [and] may be exercised to its utmost extent...." (Emphasis added.) As to this "plenary ... power over commerce ... among the several states," it was "vested in Congress as absolutely as

it would be in a single government," thus making Congress the sole depository of that power:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances...the sole restraints on which they have relied, to secure them from its abuse. [Id.]

If Congress passes the buck, transferring to an administrative agency the power to "prescribe the rule by which commerce is to be governed," then it has undermined this vital constitutional principle of electoral accountability to the people. Likewise, if Congress transfers to such an agency the power to determine the "manner" in which its declared policies are to be implemented, it has transferred to that agency the power to determine the "necessary and proper" means by which its policies are to be executed. Chief Justice Marshall also ruled, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that it was Congress, not the courts (*a fortiori* not any administrative agency with judicial power), in which the people had "confid[ed] the choice of means" so as not "to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." Id., 17 U.S. at 415.

Today, however, this Court has permitted departures from these salutary rules, succumbing to the claim that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Mistretta v. United States, 488 U.S. 361, 372 (1989). Even if that were so, it would not justify adjusting the Constitution's commitment to the vesting of "all" legislative powers in a Congress of the United States, as provided for in

Article 1, Section 1. Nor does it justify substituting some kind of administrative process for making the rules for the constitutionally mandated bicameral and presentment process in Article I, Section 7, no matter how "clumsy, inefficient, even unworkable" those processes may appear. *See* I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).

III. THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE OBLIGES THIS COURT TO STRIKE DOWN SECTION 109 OF THE CLEAN AIR ACT.

Prior to the 20th century, this Court unwaveringly adhered to the constitutional division of powers among the legislative, executive and judicial branches. In 1881, an unanimous court — composed of such experienced jurists as Justices Samuel F. Miller, Stephen J. Field and John Marshal Harlan — stated that the Constitution had "blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, legislative, and judicial departments of the government" and prophetically warned:

> [t]he increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them." [Kilbourn v. Thompson, 103 U.S. 168, 191 (1881).]

The Court could not have been more prescient. By the end of the first third of the 20th century, the Court's prophetic concern that "new realities" would trump the constitutional separation of powers came to pass. Harvard Law School Dean, James Landis, put it this way:

> The last century has witnessed the rise of a new instrument of government, the administrative tribunal.... In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.... [W]hen government concerns itself with the stability of an industry it is only intelligent realism for it...[to vest] the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization. [J. LANDIS, THE ADMINISTRATIVE PROCESS 1, 11-12 (1938).]

Not surprisingly, this Court's opinion in Kilbourn v. Thompson, *supra*, came under attack by those who spearheaded this administrative law "innovation." Recognizing that the "typical administrative agency exercises many types of power, including executive, legislative, and judicial power," Kenneth Culp Davis, one of the 20th century's leading legal realists, recognized that "a strict application of the theory of separation of powers would make the very existence of such an agency unconstitutional." 1 K. DAVIS & R.PIERCE, ADMINISTRATIVE LAW 24 (3d ed. 1994). He and others have valiantly attempted to deconstruct the Constitution's separation of powers, claiming that the "doctrine of separation of powers has remarkably little support in the language or the history of the Constitution" and that justices of this Court have "apparently indulged in the mistaken belief that the Constitution includes

a separation of powers requirement." 1 K. DAVIS & R. PIERCE, at 34.

Davis and others have claimed that while "Articles I, II, and III establish three Branches of government ... they say little about the powers of each." Id. Just because the Constitution does not contain a definition of the three kinds of powers does not mean that there is no meaningful legal distinction between legislative, executive and judicial powers. Indeed, the Constitution "says little" about the freedom of speech, the freedom of the press, and due process of law, but that has not prevented this Court from finding in those terms significant limits upon the power of government. To be sure, the members of this Court in several recent cases have differed in their understandings of the meaning of legislative, executive and judicial powers, *e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986), but differences of opinion over the meaning and application of the First Amendment have not deterred this Court from deciding the meaning of its terms.

If this Court should decline to adjudicate the legal norms that command separation of the legislative, executive and judicial powers, and continue to permit Congress to delegate its lawmaking powers to administrative agencies, then it will not be putting its judicial imprimatur upon a "new instrument of government," as James Landis claimed in 1938, but on an "old instrument of tyranny." For it was during the Middle Ages that the Court of Star Chamber reigned supreme in England, exercising "broad and undefined executive, legislative and judicial powers" over such matters as "trades and businesses and the conduct of elections ... and of printing." SOURCES OF OUR LIBERTIES 125, 130 (R. Perry, ed. 1978). Only after the Star Chamber was abolished by Parliament in 1648 was "due process of law as established by Magna Carta" restored in England. Id. at 125. Only by ruling that Section 109 of the

CAA effects an unconstitutional delegation of legislative power will this Court will take a similar step towards restoration of the rule of law in America.

CONCLUSION

For the reasons stated herein, the decision of the court below, that Section 109 constitutes an unconstitutional delegation of legislative power, should be affirmed and the case remanded with instructions to dismiss.

Respectfully submitted,

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